

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ALVIN BALDUS, CARLENE BECHEN, ELVIRA)
BUMPUS, RONALD BIENDSEIL, LESLIE W.)
DAVIS, III, BRETT ECKSTEIN, GLORIA)
ROGERS, RICHARD KRESBACH, ROCHELLE)
MOORE, AMY RISSEEUEW, JUDY ROBSON, JEANNE)
SANCHEZ-BELL, CECELIA SCHLIEPP, TRAVIS)
THYSSEN, CINDY BARBERA, RON BOONE, VERA)
BOONE, EVANJELINA CLEERMAN, SHEILA)
COCHRAN, MAXINE HOUGH, CLARENCE JOHNSON,) Case No. 11-CV-562
RICHARD LANGE, and GLADYS MANZANET,) JPS-DPW-RMD
)
Plaintiffs,) Milwaukee, Wisconsin
)
TAMMY BALDWIN, GWENDOLYNNE MOORE and) February 22, 2012
RONALD KIND,) 8:30 a.m.
)
Intervenor-Plaintiffs,) **VOLUME III**
) **A.M. SESSION**
v.)
)
Members of the Wisconsin Government)
Accountability Board, each only in his)
official capacity: MICHAEL BRENNAN,)
DAVID DEININGER, GERALD NICHOL, THOMAS)
CANE, THOMAS BARLAND, and TIMOTHY VOCKE,)
and KEVIN KENNEDY, Director and General)
Counsel for the Wisconsin Government)
Accountability Board,)
)
Defendants,)
)
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TRANSCRIPT OF COURT TRIAL

BEFORE DIANE WOOD, CIRCUIT JUDGE, ROBERT DOW, JR., DISTRICT
JUDGE, and J. P. STADTMUELLER, DISTRICT JUDGE

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1 F. JAMES SENSENBRENNER, JR., THOMAS E.)
 2 PETRI, PAUL D. RYAN, JR., REID J.)
 3 RIBBLE, and SEAN P. DUFFY,)

Intervenor-Defendants.)

4 _____)
 5 VOCES DE LA FRONTERA, INC., RAMIRO)
 6 VARA, OLGA VARA, JOSE PEREZ, and)
 7 ERICA RAMIREZ,)

Plaintiffs,)

8 v.) Case No. 11-CV-1011
 9) JPS-DPW-RMD

10 Members of the Wisconsin Government)
 11 Accountability Board, each only in his)
 12 official capacity: MICHAEL BRENNAN,)
 13 DAVID DEININGER, GERALD NICHOL, THOMAS)
 14 CANE, THOMAS BARLAND, and TIMOTHY)
 15 VOCKE, and KEVIN KENNEDY, Director and)
 16 General Counsel for the Wisconsin)
 17 Government Accountability Board,)

Defendants.)

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P R O C E E D I N G S

THE BAILIFF: Hear Ye, Hear Ye, Hear Ye, the United States District Court for the Eastern District of Wisconsin is now open, the Honorable Judges J. P. Stadtmueller, District Judge, Eastern District of Wisconsin, Diane P. Wood, Circuit Court Judge, United States Court of Appeals for the Seventh Circuit, and Robert M. Dow, Jr., District Judge, Northern District of Illinois, presiding.

All persons having business before this Honorable Court are admonished to draw near and give their attention for this special three-judge court convened pursuant to Title 28, United States Code, Section 2284 is now in session.

God save the United States and this Honorable Court. Please be seated and come to order.

THE BAILIFF: The court calls Alvin Baldus, et al, versus Michael Brennan, et al, Case No. 11-CV-526, for the continuation of a court trial. May I please have the appearances, beginning with the plaintiffs.

MR. POLAND: Good morning, Your Honor. Doug Poland Dustin Brown and Wendy Arends appearing on behalf of the Baldus Plaintiffs.

MR. EARLE: Good morning, Your Honors. Peter Earle and Jackie Boynton appearing on behalf of Voces de la Frontera, Plaintiffs.

MR. HASSETT: Good morning. Scott Hassett and Jim

1 Olson of Lawton & Cates on behalf of the Intervenor Plaintiffs.

2 MS. LAZAR: Good morning, Your Honors. Assistant
3 Attorney General Maria Lazar appearing on behalf of the
4 Defendants, the Members of the Wisconsin Government
5 Accountability Board, and their director and general counsel.
6 Also appearing with me are attorneys Dan Kelly, Patrick Hodan,
7 Colleen Fielkow and Jack Curtis.

8 In addition, Your Honor, we just wanted to point out
9 one minor point. The defendants in this case are the
10 Government Accountability Board. The Department of Justice,
11 through the Attorney General's Office with its special counsel,
12 represents the Government Accountability Board, not the
13 Legislature, as is noted one more time on the Plaintiffs'
14 pleadings. We just wanted to make sure that everyone knows who
15 the players are and just bring that to the court's attention
16 again. Thank you.

17 MR. SHRINER: Good morning, Your Honor. Thomas
18 Shriner and Kellen Kasper for the Intervenor Defendants.

19 JUDGE STADTMUELLER: Thank you. Good morning,
20 Counsel. As we left yesterday afternoon, the court had asked
21 for further briefing on the matter of the attorney-client
22 privilege issue with respect to any testimony to be taken from
23 Attorney James Troupis, as well as some further briefing on the
24 subject that we spent a bit of time on last evening with
25 respect to whether or not the Legislature, indeed, has the

1 authority, if they chose to do so, to revisit the subject of
2 the redistricting legislation, in particular Act 43. At the
3 outset I want to again extend on behalf of myself and my
4 colleagues and our staff our sincere appreciation for the
5 parties and their counsel having taken the time, on relatively
6 short notice, to make further written submissions in response
7 to the concerns expressed by the court.

8 We have had an opportunity both last evening and
9 again this morning to consider these subjects, and I'm going to
10 defer to my colleague, Judge Dow, who will deliver the opinion
11 of the court with respect to the matter of the attorney-client
12 privilege issue and the clarification that Mr. Troupis and his
13 counsel sought. Judge Dow?

14 JUDGE DOW: Thank you, Judge Stadtmueller. On the
15 motion for clarification concerning the scope of inquiry for
16 Mr. Troupis' testimony and deposition that will precede that
17 testimony, we have considered the parties' briefs and provide
18 the follows guidance in the interests of efficiency for the
19 parties and the court, and to address the ethical dilemma that
20 arises when an attorney is subpoenaed to testimony regarding
21 communications with his client.

22 The court already has ruled that certain documents
23 are not within the scope of the attorney-client privilege and
24 has indicated a preliminary view that Mr. Troupis will be
25 required to testify and should sit for a deposition prior to

1 giving that testimony so that his examination at trial can be
2 as focused as possible on issues that require resolution by
3 this court.

4 We agree with Plaintiffs that Mr. Troupis' testimony
5 may be relevant -- indeed, likely will be relevant -- to issues
6 of intent and the totality of circumstances that are germane to
7 the Voting Rights Act claims as to Districts 8 and 9 as they
8 have been drawn in Act 43.

9 We also agree with Plaintiffs that Mr. Troupis'
10 participation in the political, strategic and policy aspects of
11 the redistricting process was not limited to his dealings with
12 MALDEF, and that there may be additional areas of legitimate
13 inquiry, though we stress that the inquiry should be focused.
14 Indeed, given the time constraints under which all of us are
15 operating, Plaintiffs would be well advised to pare their
16 questioning, both at deposition and trial, to what is essential
17 to their case.

18 In sum, as to political, strategic or policy matters
19 and as to communications and documents shared with third
20 parties, such as MALDEF, the court has been clear and
21 consistent, any attorney-client privilege either did not exist
22 or was waived.

23 However, we do conclude that further exploration with
24 Mr. Troupis of certain documents that have been released
25 pursuant to the court's prior orders would impermissibly tread

1 on the attorney-client privilege and/or Attorney Work Product
2 Doctrine. Although we found the documents themselves were not
3 subject to the privilege, largely because of the almost
4 complete melding of the political and legal processes
5 undertaken by the Legislature in this instance, we are mindful
6 that Mr. Troupis is a lawyer -- indeed, a very experienced
7 lawyer in this area -- and that the further exploration of his
8 legal advice to his client and his mental impressions is not
9 warranted, notwithstanding the denial of the privilege as to
10 the documents themselves. The documents as to which further
11 inquiry at deposition or at trial is not permitted are Nos. 31
12 through 32, 39 through 40, 70 through 73 and 76 through 82.
13 When I use those numbers, I'm referring to the numbers as we
14 were given the documents. We were given 1 through 84 prior to
15 our ruling last week. Rather than switching conventions on
16 you, I'm going to use those documents to describe the documents
17 that were subject to the prior order.

18 In regard to the documents that were produced last
19 week and were not the subject of the court's February 16th
20 order, the court concludes that the following are off limits
21 for further inquiry for the same reasons, and here I'm going to
22 use the Bates numbers, JRT81, 86, 113, 126 and 127.

23 The final thing that I would say, and I'm sure I
24 speak for all of us not only in regard to everything I have
25 previously said, but especially in regard to what I'm going to

1 repeat here, and that is that the Plaintiffs would be well
2 advised to focus on what is essential to their case given the
3 time constraints we're operating under. Okay. That's all I
4 have on this issue.

5 JUDGE STADTMUELLER: Thank you, Judge Dow.

6 MR. DAUGHERTY: Your Honor, if I can be heard just
7 briefly. Don Daugherty on behalf of Attorney Troupis. So the
8 court is directing Mr. Troupis to testify pursuant to the
9 Supreme Court rule exception under 21.6 I think it's 5 pursuant
10 to a court order, correct?

11 JUDGE DOW: Yes, that is correct, and I should have
12 included that. The ethical dilemma comes right out of that
13 provision of your rules, so that is the basis for our ruling.

14 MR. DAUGHERTY: Thank you.

15 JUDGE DOW: Thank you, sir.

16 MR. EARLE: May I address the court?

17 JUDGE STADTMUELLER: You may, Mr. Earle.

18 MR. EARLE: A further point of clarification. We had
19 anticipated, in connection with the deposition of Attorney
20 Troupis, a duces tecum requiring him to produce any
21 correspondence or email that fall within the scope of the prior
22 orders of the court, but which may not yet have been produced.
23 The question of whether we have achieved final certification
24 remains ambiguous, and in the view of the Plaintiffs was placed
25 in more question by one of the paragraphs in the motion for

1 clarification, which seemed to indicate that Attorney Troupis
2 had been relying on third parties and others to comply with the
3 court's orders. The question is not clear whether Attorney
4 Troupis has conducted an adequate search and identified
5 documents responsive to the court's prior orders.

6 JUDGE STADTMUELLER: Well, in that regard I think,
7 first of all, as officers of the court and we as judges have
8 endeavored to work our way through this with a limited set of
9 documents. Obviously, one of you held up a large sheath of
10 documents yesterday that were never provided to the court, and
11 I'm not suggesting for a minute that they should have been, but
12 Judge Dow I think has a reasonably good approach in identifying
13 for you those documents that clearly are beyond the
14 attorney-client privilege question. There are others that
15 remain within the scope of the attorney-client privilege, and
16 to the extent that documents that the court has not had the
17 benefit of reviewing fall within either category, I think you
18 now have sufficient guidance from which to approach questioning
19 the witness. It is for that reason and that very reason that
20 we did not want to take counsels' time or our collective time
21 engaging in what would be best described as pretrial discovery
22 in the context of the trial proceeding, which I will address
23 following Judge Wood's order with regard to the issue that we
24 addressed yesterday, and that is whether there is, indeed, a
25 roadblock or an insurmountable Supreme Court opinion that would

1 preclude the Legislature revisiting the subject of Act 43. In
2 that regard I will now defer to Judge Wood.

3 JUDGE WOOD: Thank you, Judge Stadtmueller. On
4 behalf of the court we have all prepared a brief order to this
5 effect which I will read addressing this subject. As we know,
6 this case presents the latest chapter in the redistricting of
7 Wisconsin's legislative and congressional districts after a
8 decennial census. As required by 28 U.S.C. Section 2284, this
9 three-judge court has been convened to address the consistency
10 of those statutes with federal law. Before proceeding with
11 trial, however, the court concluded that one last serious
12 effort to resolve these issues in the proper forum, that is to
13 say the State Legislature, was advisable. This was in keeping
14 with the consistent guidance from the Supreme Court of the
15 United States stressing the fact that redistricting is
16 primarily the duty and responsibility of the state. The court
17 reminded us of that as recently as Perry versus Perez this
18 year, quoting many other cases.

19 At the time this court made that suggestion, all
20 parties agreed to explore this question seriously. But when we
21 reconvened yesterday afternoon, however, counsel for the
22 Defendant Government Accountability Board presented what he
23 described as a "good-news bad news" scenario. He stated that
24 the Legislature was willing to consider making changes to the
25 maps that are before the court, but that it believed itself to

1 be under a binding legal prohibition against doing so based on
2 the Constitution of Wisconsin and the Wisconsin Supreme Court's
3 decision in *State ex rel. Smith versus Zimmerman*, a 1954
4 decision.

5 The preliminary question that this court must resolve
6 is whether it has the authority to express an opinion on the
7 ability of the Legislature to act. We conclude that we do
8 possess that authority. Settlement is a firmly established
9 part of the pretrial process in Federal courts, as you know
10 from Federal Rule of Civil Procedure 16(a). Courts are
11 entitled to issue orders compelling litigants to meet and
12 confer and to conduct discussions with parties empowered to
13 make decisions. If one party takes the position that it is
14 under a legal disability to proceed with the settlement
15 process, the court has the authority to resolve that question
16 before moving ahead with the case. If it agrees that
17 settlement is legally precluded, then it must, of course, move
18 ahead to the formal trial. If it concludes that settlement is
19 permissible, then it is entitled, as a part of its general
20 authority over case management, to order the parties to engage
21 in these discussions. In the present case, we conclude that
22 this court both can and must decide whether the Wisconsin
23 Constitution, as interpreted by the Supreme Court of Wisconsin
24 in *Smith versus Zimmerman* and related cases, imposes such a
25 legal blockade against the Legislature that would preclude it

1 from acting.

2 The fact that this requires us to engage in an
3 interpretation of state law is of no moment. Federal courts
4 routinely decide questions of state law that arise in
5 conjunction with proceedings both under the federal question
6 jurisdiction, which is what supports the present case, or under
7 the diversity jurisdiction. Although it would have been this
8 court's preference to refer this question of state law to the
9 Supreme Court of Wisconsin for an authoritative interpretation,
10 it appears that this option is not available to us. The
11 governing statutes and rules that Wisconsin has adopted limit
12 the certification procedure to questions referred by the
13 Supreme Court of the United States, a Federal Court of Appeals
14 or a fellow state Supreme Court. I'm referring to Article 8,
15 Section 3, Subsection 3 of the Wisconsin Constitution which
16 states that the Supreme Court, among other things, may accept
17 cases on certification by the Court of Appeals, and to
18 Wisconsin Statute 821.01, which provides that, quote, "The
19 Supreme Court may answer questions of law certified to it by
20 the Supreme Court of the United States, a Court of Appeals of
21 the United States or the highest appellate court of any other
22 state" in certain circumstances. Perhaps the Legislature
23 overlooked the now rare phenomenon of the three-judge district
24 court, which is comparable to a Court of Appeals insofar as its
25 decisions are appealable directly to the U. S. Supreme Court,

1 or perhaps this omission was intentional. No matter. The
2 plain language of the State Constitution and the statute
3 precludes us from taking this preferable avenue, and so of
4 necessity we must decide.

5 The natural starting point for our analysis is the
6 language of the Wisconsin Constitution. Article IV, Section 3
7 provides, and here we emphasize the same words as we did
8 yesterday, "At its first session after each enumeration made by
9 the authority of the United States, the Legislature shall
10 apportion and district anew the members of the Senate and
11 Assembly, according to the number of inhabitants." The most
12 natural reading of that language is as a reference to one of
13 the normal biennial sessions of the Wisconsin Legislature. In
14 response to a question from the court yesterday, counsel for
15 the Defendant Intervenors, the members of the Republican
16 delegation to the United States House of Representatives,
17 opined that for at least 100 years the Wisconsin legislative
18 sessions after been two years in duration. That view was
19 confirmed by the Legislature's own web page, which states that,
20 quote, "Wisconsin legislative sessions are referred to by the
21 odd-numbered year in which the session starts," close quote.

22 We see nothing in Article IV, Section 3 that
23 forecloses the General Assembly from revisiting its plans of
24 redistricting and reapportionment during its current session.
25 Indeed, the Smith decision itself states that the

1 constitutional prohibition is directed at the phenomenon of,
2 quote, "frequent redistricting," close quote. Later in the
3 opinion, the court reiterated that it was rejecting the
4 relator's argument because, quote, "for all practical purposes,
5 under the relator's view, the Legislature may redistrict the
6 state as often as it chooses, the constitutional prohibition to
7 the contrary notwithstanding," close quote. Action within the
8 first session after the decennial census, if it is completed
9 before the first election that occurs under the new boundaries,
10 poses no risk at all of "frequent redistricting." Instead, it
11 is compatible with a reading of the State Constitution to the
12 effect that the Legislature is authorized to undertake and must
13 conclude its reapportionment and redistricting duties during
14 the first session after each national census.

15 Indeed, Defendant Government Accountability Board
16 itself has previously acknowledged the Legislature's authority
17 to amend the redistricting plan before the end of the current
18 session. In an internal memorandum issued November 10, 2011,
19 the GAB stated that its plan of action included, quote,
20 "working with the Legislature to develop legislation that will
21 make necessary technical corrections to Acts 39, 43 and 44 to
22 correct districts," close quote. The GAB continued, quote,
23 "The simplest way to accomplish this is to make technical
24 corrections to the Acts," close quote. The GAB does not
25 suggest anywhere in the memorandum that its plan of action

1 might conflict with state law. Similarly, the record reflects
2 no objection from the Legislature to the GAB's assumption that
3 the Acts could be corrected for this purpose.

4 We agree with the GAB's earlier position. Nothing in
5 Zimmerman stands in the way of further revision by the General
6 Assembly at this time. In the first place, the facts of
7 Zimmerman are both highly unusual and distinguishable from our
8 situation. In Zimmerman, the Legislature enacted the
9 apportionment at issue in 1951, but the Act was not to become
10 operative until January 1, 1954, and then only if in a
11 referendum held at the time of the 1952 general election the
12 people should reject a proposal to establish Senate or Assembly
13 districts on an area as well as a population basis. The
14 proposal was rejected. Then, in the session beginning in 1953,
15 I reiterate, a new session, the Legislature enacted a new law
16 to correct the old one. Consistent with the established
17 duration of Wisconsin legislative sessions, it is self-evident
18 that the 1953 law was not enacted during the first session of
19 the Legislature following the 1950 decennial census.

20 In rejecting the contention that the 1953 Legislature
21 retained and still possessed the power to redistrict areas
22 already districted in the 1951 law, the Wisconsin Supreme Court
23 ruled that the subject of reapportionment, quote, "passed
24 beyond the Legislature's power of revision at the date of the
25 referendum at the very latest," that would have been 1954,

1 adding that "it is not necessary to decide now whether it so
2 passed at an earlier date." So the court just didn't hold that
3 the passage of the 1951 law alone was enough to exhaust the
4 Legislature's power.

5 Additional limitations in Zimmerman also support this
6 understanding. Among other things, the court noted these
7 things. Both Houses of the Legislature passed the bill, number
8 one. Number two, the governor signed it. Number three, the
9 Secretary of State published it. Number four, the Legislature
10 adjourned sine die. And number five, the citizens of the
11 state, by their action in the referendum, brought to pass the
12 condition on which the finality of the Rosenberry
13 reapportionment of 1951 depended. Here, the first, second and
14 third steps have been accomplished. Step 5 is not in play,
15 because it was unique to the 1951 Act, but Step 4 has not yet
16 occurred.

17 Having concluded that neither the Constitution of
18 Wisconsin nor any ruling by the State Supreme Court stands in
19 the way of further legislative consideration of the issues
20 raised in this litigation, we note also from a broader
21 perspective that the ground has shifted considerably since the
22 mid 1950's. More recent decisions of the Wisconsin Supreme
23 Court and the Supreme Court of the United States are fully
24 consistent with an effort to see if the state Legislature might
25 correct any possible flaws in the legislation while it is still

1 in its first session after the census. Indeed, these more
2 recent materials indicate this is not only a proper course, but
3 a preferred one.

4 Zimmerman, of course, was decided well before Baker
5 versus Carr, a 1962 decision of the Supreme Court, and the
6 enactment of the Voting Rights Act prior to which redistricting
7 and reapportionment were thought to be non-justiciable
8 political questions. After those measures, judicial review of
9 redistricting statutes became not only permissible, but
10 routine. These developments raised new questions about the way
11 in which federal and state institutions were to interact. As
12 I've already said, the Supreme Court of the United States has
13 emphasized the primacy of the state's role, even while it has
14 steadfastly upheld a role for the federal courts in this area
15 when all else fails.

16 The Wisconsin Supreme Court has sent a similar
17 message. In Jensen versus Wisconsin Elections Board, decided
18 in 2002 during the last round of Wisconsin's redistricting,
19 that court emphasized that, quote, "congressional
20 reapportionment and state legislative redistricting are
21 primarily state, not federal, prerogatives, and they remain
22 inherently political and legislative, not judicial," close
23 quote, tasks. They also commented the framers in their wisdom
24 entrusted this decennial exercise to the legislative branch
25 because the give and take of the legislative process involving,

1 as it does, representatives elected by the people to make
2 precisely these sorts of political and policy decisions, is
3 preferable to any other. By contrast, adjudicating these
4 issues is not a comfortable place for any court, state or
5 federal.

6 Having made those comments, though, the State Supreme
7 Court declined to accept an original action on the issue of
8 redistricting given the fact that there was ongoing federal
9 litigation on exactly the same issue. In essence, the state
10 court recognized that comity is a two-way street, and it
11 refused the invitation to intervene at a late stage of the case
12 because, as it explicitly said, of principals of cooperative
13 federalism and federal-state comity, and also a desire to avoid
14 unjustifiable duplication of effort and expense. At the same
15 time, it urged the Legislature to, quote, "now undertake to
16 give the people of this state their due, and timely deliver a
17 plan of legislative redistricting."

18 The Supreme Court of the United States made similar
19 comments in the LULAC against Perry case, which recognized the
20 primacy of state law in legislatures, and also mentioned the
21 proposition that, when possible, courts should avoid passing
22 unconstitutional questions, the familiar Ashwander principle.

23 Our conclusion, therefore, is that the Wisconsin
24 Constitution requires only that the Legislature discharge its
25 redistricting and reapportionment duties during its first

1 session after the 2010 decennial census -- a session that
2 remains ongoing. Nothing in Zimmerman is inconsistent with
3 that reading of the Wisconsin Constitution, nor with
4 post-Baker, post-Voting Rights Act jurisprudence of both the
5 Wisconsin Supreme Court and the Supreme Court of the United
6 States. In fact, our position the fully consistent with a
7 number of related doctrines, including federalism, comity,
8 judicial economy, separation of powers and constitutional
9 avoidance. We do not doubt whether there is authority to
10 revisit it the current plan; the question is whether there is a
11 will to do so.

12 We, therefore, hold that there's no legal impediment
13 to the parties' compliance with our order to confer in good
14 faith to see if a settlement might by reached in this case.
15 Since preliminary discussions have already taken place, the
16 parties are hereby ordered to take that step, and Judge
17 Stadtmueller can correct me if I'm wrong on time, but I believe
18 to report back to this court by 2:00 p.m. today to see whether
19 any such settlement is possible, or if they have reached an
20 impasse. Depending on that outcome, we will proceed
21 accordingly.

22 THE COURT: Thank you, Judge Wood. Consistent with
23 Judge Wood's opinion this morning, the way the court is going
24 to leave the matter as of 10:30 is we will expect that counsel
25 report back to the court. We will not reconvene, but you must

1 report back to the court not later than 2:00 p.m. this
2 afternoon as to what the final decision may be with respect to
3 the Legislature revisiting the subjects that we have been
4 discussing over the last day and one-half. The reason for the
5 2:00 p.m. cutoff is that lawyers who are going to be trying
6 this case need to be prepared. We will start the trial
7 tomorrow morning at 8:30. We expect to complete all of the
8 testimony at some point Friday, whether it's late afternoon or
9 into the evening. We have no intention, at least on the basis
10 of the record as it now stands, to carry this trial forward
11 into next week. So I again will implore counsel to redouble
12 their efforts to narrow the issues, narrow the number of actual
13 live witnesses who will have to give testimony or who may be
14 expected to give testimony, including the matter of
15 Mr. Troupis' testimony. If counsel are agreeable, you may
16 simply file a deposition transcript in lieu of a trial
17 transcript, or you can redact the transcript with only certain
18 questions and answers as need be appropriate. We're not
19 interested in elongating this process anymore than is
20 absolutely required.

21 With respect to tomorrow's schedule in the event we
22 do go forward, we will convene at 8:30 with opening statements
23 and begin with the testimony of the plaintiffs' witnesses. As
24 I indicated at the final pretrial conference, I will leave it
25 to counsel to work out among yourselves the order in which

1 individual witnesses will be cross-examined, whether they be by
2 the Intervenor Defendants or the principal Defendants or
3 Intervenor Plaintiffs to the extent that they may have some
4 follow-up questions. But all of these matters can be
5 effectively addressed in good, open communications with
6 counsel, and to the extent that any of the proffered live
7 witnesses testimony can be avoided, either by stipulation or
8 submitting a proffer to which opposing counsel have no
9 objection, what we are endeavoring to accomplish is to complete
10 the trial record Friday evening. If that's not possible, we
11 will address returning on Monday, but we're not looking to take
12 that step, quite candidly. Are there any other matters that we
13 need to address this morning?

14 MR. POLAND: Your Honor, if I may. How would the
15 court prefer the parties report back by 2:00 p.m.? Would you
16 prefer in writing? Phone call?

17 JUDGE STADTMUELLER: You can contact Mr. Willenbrink
18 and he will advise the court.

19 MR. POLAND: Thank you, Judge.

20 MR. KELLY: Your Honor, we would like to clarify how
21 you conceive of the meet and confer proceeding this afternoon.
22 As Ms. Lazar mentioned this morning, we represent an
23 independent executive branch of the Wisconsin government. We
24 don't represent the Legislature. We will certainly take the
25 court's decisions and rationale to the Legislature for their

1 consideration and place that before them and report back to the
2 court what their decision is, but I don't know if you envision
3 any other role than that for us, because we don't represent
4 them.

5 JUDGE STADTMUELLER: And I understand, and I leave it
6 to you and Mr. Poland and Mr. Earle, if all three of you want
7 to meet and confer with their lawyers, if they have counsel
8 that they are working with, we don't need to know who they are,
9 it's just to ensure that they have an opportunity to reflect
10 upon the opinion of the court, namely, that there is no
11 impediment in the view of this court to their revisiting the
12 subject, since time with each passing hour is becoming more
13 critically important in terms of whatever steps are taken, both
14 with regard to the trial and the court having an opportunity to
15 digest all of the evidence, much of which is already before us
16 in written form, and depending on the court's ruling whether
17 there need be any further action taken by the Legislature.

18 MR. KELLY: Your Honor, would it be the court's
19 anticipation that if we were to reach some form of settlement,
20 that the court would make a declaration that that settlement
21 results in a constitutionally sound map? And the reason I ask,
22 Your Honor, is because of the need for a preclusive effect so
23 that someone else doesn't tomorrow start another piece of
24 litigation against whatever map results from any settlement
25 that happens to be reached.

1 JUDGE STADTMUELLER: Well, in anticipation of that
2 unintended consequence, if you will, I think it in large
3 measure is going to be dependent upon how open the legislative
4 process becomes. If it is simply shake and bake with no
5 legislative committee hearings and no opportunities for third
6 parties to present their views, which has been consistently the
7 biggest problem in this case, is that the process is not in
8 keeping with traditional notions of open, transparent
9 government. To the extent that these issues can be set aside
10 and the process be made open, as generally is the case with
11 legislation, they ought not be concerned, but they do need to
12 be concerned about the views of those who have a stake in all
13 of this and, obviously, a reasoned approach can be had.

14 JUDGE WOOD: I might add a word about that, as well,
15 which is simply to say, which I'm sure you well know, any
16 hypothetical future litigation would be governed by Wisconsin's
17 rules of claim and issue preclusion, if it happened to be in
18 state court, or there might be some issue of federal law, and
19 courts can't fully anticipate that, but on the other hand,
20 stare decisis is a very strong principle in our system. We
21 normally don't have a rule that we preclude people who have
22 never had a day in court, but on the other hand, a good, solid
23 opinion is normally the end of things. There's not a long
24 history of repeated litigation that exists in these kinds of
25 cases, so I think it's the soundness of the ultimate plan and

1 the strength of the opinion are what are your primary
2 protections.

3 MR. KELLY: One moment, Your Honor. I just want to
4 make sure I understand then that the court understands that if
5 we were to reach -- if the Legislature were to revisit Act 43
6 or Act 44 and make any changes, that we would then come back to
7 this court and there would be a dismissal with prejudice of
8 this litigation. Would it be the court's opinion that that
9 dismissal with prejudice would be a sufficient ruling on the
10 merits, that no further complaint based on those causes of
11 action would be justiciable?

12 JUDGE WOOD: Again, I would say that, subject to the
13 review of the revised plan, I mean, it's impossible for us to
14 sit here right now and rule on a plan we have never seen.
15 Assuming the revised acts pass muster, of course this case
16 would be dismissed with prejudice, but it's not possible for us
17 to say to somebody who's a stranger to this litigation what
18 that person's rights are, hypothetically speaking. The present
19 plaintiffs would not be able to come back, of course.

20 MR. KELLY: So the result of the legislative action
21 would be that this case would be automatically dismissed, is
22 that right? There would be no further review of that plan in
23 this case?

24 JUDGE WOOD: Assuming that -- I mean, we would have
25 to look at the plan, but, yes, assuming that the plan is

1 acceptable, that's my understanding.

2 JUDGE STADTMUELLER: Absolutely.

3 MR. KELLY: So we would still have a trial on the
4 acts, but it would be a trial on the acts as amended as opposed
5 to the acts as they exist today?

6 JUDGE WOOD: Only if we thought that there was a
7 disputed issue that required a trial, I would think.

8 JUDGE STADTMUELLER: I guess I would liken it to the
9 settlement, for example, in a class action litigation in which
10 the settlement requires approval by the court before whom the
11 underlying action was pending, and if all of the issues are
12 appropriately addressed, and assuming that the concerns that
13 the plaintiffs have raised in this case are adequately
14 addressed and that we don't create other issues by revisiting
15 the plan, for example, denying other constituents in these
16 districts their one-man, one-vote right. So I guess at the end
17 of the day there is a focus point of the shortcomings, that be
18 an appropriate descriptor of the current legislation, and if
19 amending it or revisiting it is done in a manner that creates
20 other issues for the court, forgetting if there are no other
21 parties that object, but the court is obliged to make an
22 independent determination based upon the principles that are
23 before us in this very case, and assuming those principles are
24 appropriately addressed and there are no lingering issues, I
25 have no hesitancy in speaking for my colleagues in telling you

1 that the plan would certainly receive the approval of the
2 court.

3 MR. KELLY: But, Your Honor, with respect, to provide
4 the court with that kind of information necessary to make a
5 determination of whether that amended plan would meet
6 constitutional muster, that is to say that it addressed the
7 concerns of the plaintiffs, it would require exactly what we
8 are prepared to do, were prepared to do yesterday, which is put
9 on a three- to four-day trial with all of our experts to
10 explain to the court all of the factors that go into building a
11 constitutional map. It does not seem like what we are
12 proposing here is going to advance the ball very far if we are
13 going to be presenting the same trial, perhaps with some
14 modifications around the edges to address whatever the
15 Legislature chooses or not chooses to do, but we're still going
16 to have all of our experts here, we're still going to have days
17 of testimony, we're still going to have all of the legal
18 arguments about whether the issues have been, in the court's
19 eyes, adequately addressed.

20 JUDGE DOW: Why would that be so if there's
21 agreement? I mean, essentially you have got plaintiff parties
22 coming in here to complain about the current map, for lack of a
23 better word. I know that there is a whole process they are
24 complaining about, as well, but if those current concerns are
25 addressed and there aren't any disputes, I don't know why we

1 need have to a trial. We have enough paper here -- I mean, I
2 think there are some parties out here that think that we have
3 enough paper here to decide this case on summary judgment or on
4 a motion for judgment on the pleadings. If you take away the
5 disputed issues, I don't know why we'd need to have a trial.
6 We certainly have enough here to make a lot of findings.

7 JUDGE WOOD: And I don't know why, if there's
8 agreement, I mean, I guess that the whole concept of this was
9 everybody getting together. I think you are jumping ahead to
10 really a worst-case scenario in which agreement would fall
11 apart, the Legislature would do something that they still
12 didn't like, but these Plaintiffs are part of the process. I
13 think the analogy to a class action settlement is an excellent
14 one.

15 MR. KELLY: Thank you, Judge Wood, and I may have
16 missed the import of what you said earlier today. There was a
17 suggestion that the process would be the thing, that this would
18 be -- that there would be public hearings, there would be
19 committee hearings, there would be amendments and this would
20 travel through the normal legislative process. But I think I'm
21 hearing you say now that we would have an agreement about what
22 the amendment would be, which means there would be no committee
23 hearings necessary, no public hearings necessary. So it's one
24 or the other. We can either address the Plaintiffs' concerns
25 on an agreed basis, or we open the process up and essentially

1 start over with the redistricting process. But if we reopen it
2 to do a new redistricting process, there's not even a
3 suggestion that the Plaintiffs would be satisfied with that.
4 The Legislature decided, in its good judgment, that it passed a
5 solid constitutional plan. It embodies their judgment of
6 what's best for the people of the State of Wisconsin. There is
7 no reason to believe that going back they are going to adopt
8 whatever the Plaintiffs happen to want in this case, because
9 there's always going to be some other group of people who want
10 something different.

11 The nature of redistricting is it's not going to
12 please everyone. There will be another group that wants
13 something completely different, they will complain, they will
14 come to court, we will go back to the Legislature, we will
15 start the process over again, we will get another political
16 map, and then we will present it to the court, and we're going
17 to keep going through this iterative process without a natural
18 resolution. So we can either do this potentially on a settled
19 basis, which would require confidential communications with the
20 parties in such a way that the members of the Legislature would
21 be able to agree amongst themselves about what parts of the
22 Plaintiffs' concerns would be addressed, and then they could
23 pass that without committee hearings, without public hearings
24 and without that political process. Or we can do the political
25 process with no guarantee that the Plaintiffs' concerns are

1 going to be adopted, because in the Legislature's mind their
2 concerns are baseless.

3 JUDGE STADTMUELLER: Well, all of that in be true,
4 but unfortunately, Mr. Kelly, from the record that is before
5 the court, we don't know what the Legislature did other than
6 pass an act. For example, you mentioned experts. We have no
7 idea what they really relied upon. It may have been totally a
8 political decision, and that's fine, they are entitled to make
9 a political decision, but the political decision still has to
10 pass constitutional muster, and that's what this litigation is
11 all about, at least in the view of these three judges.

12 MR. KELLY: I completely agree, Your Honor.

13 JUDGE WOOD: Could I just get some clarification from
14 you about one point, because I guess what I had understood this
15 to be about is whether it's possible to settle the claims that
16 are actually before this court from the various Plaintiffs that
17 are here in a way that would be acceptable to all sides so that
18 we could have an agreed conclusion. Now I would imagine that
19 part of that conclusion would have to be not just a promise
20 from the Legislature to pass corrective legislation, but actual
21 passage of it, but I also start from the premise, which I take,
22 among other things, from the Perez litigation that there's a
23 great deal of this that is let's say less contested than other
24 parts of it. There might be some focus in any particular
25 settlement, I'm not going to prejudge what happens in

1 settlement, but it seems to me we are not talking about
2 throwing out the entire map and starting over again, we're
3 talking about can this case be settled.

4 MR. KELLY: Judge, I think that puts a nice bow
5 around the question. If this is going to be a settlement, then
6 I don't think there's going to be a need for any
7 post-settlement trial on whether that map is constitutional.
8 But we do need the court's imprimatur that it's constitutional
9 for the settlement to have any significance whatsoever, because
10 otherwise we will have another group of plaintiffs.

11 JUDGE WOOD: So essentially you want a consent
12 decree. You want more than just a private settlement, you want
13 a consent decree, it sounds to me like.

14 MR. KELLY: That's essentially what we would need.
15 If the court believes it has the authority to issue a consent
16 decree that would be binding on everyone else in the State of
17 Wisconsin so that we don't go through this again in a couple of
18 weeks, then I think the Legislature might be able to move ahead
19 with a potential settlement.

20 JUDGE STADTMUELLER: I see no problem with that, if
21 you want to cast it as a consent decree as opposed to private
22 settlement or whatever.

23 MR. KELLY: That's fine. I want to make sure we're
24 not doing this again in a few weeks.

25 JUDGE WOOD: I don't think any of us really wants to.

1 JUDGE DOW: And the issue, just from a trial
2 perspective, we wouldn't be sitting here if we didn't think
3 there was some issue for trial, but you guys control the
4 ability to take those things off the table by ceasing to have a
5 dispute about them. I mean, that's kind of -- I understand
6 your point is so even if all of us sitting in this room cease
7 to have a dispute about them, what about the rest of the world
8 that may have a dispute. I understand that point. But in
9 terms of simplifying this for trial, if you guys cease to have
10 a dispute, there isn't anything to try here. We have a lot of
11 paper here that we could make findings on, if there's nothing
12 in dispute.

13 MR. KELLY: As a factual matter, yes. But even if we
14 were to cease to have a dispute, just so the court is clear, I
15 can't make the Legislature do anything. I mean, they have
16 their own authority, they have their own priorities and issues,
17 and they will do what they are going to do, and we will convey
18 what the court has said to them.

19 JUDGE DOW: And they may well have their own
20 incentives, as well. I mean, as the case now stands, there's a
21 triable fact on constitutional claims, and our dictates are to
22 avoid those, if possible, that's all part of what Judge Wood
23 was reading a half-an-hour ago, but they also may have
24 incentives that they might like to take those issues off the
25 table to avoid the possibility that they might lose the

1 litigation. That's the issue.

2 MR. KELLY: Thank you, Your Honor.

3 JUDGE STADTMUELLER: Very well. There being nothing
4 further, the court will stand adjourned and we will await
5 further word. Before we do that, Mr. Shriner, in keeping with
6 the court's comments earlier, you don't have to say anything
7 now, but you may recall the Court suggesting last evening that
8 you and Mr. Earle explore, perhaps, a stipulation.

9 MR. SHRINER: Mr. Olson and Mr. Hassett and I have
10 had conversations. I think we are very close to being agreed
11 on what the testimony of our witnesses would be and being able
12 to submit it.

13 JUDGE STADTMUELLER: Very well. Thank you. The
14 court stands in recess.

15 THE BAILIFF: All rise.
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1 UNITED STATES DISTRICT COURT)
2)SS
3 EASTERN DISTRICT OF WISCONSIN)
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5 I, KATHY A. HALMA, Official Court Reporter
6 for the United States District Court, Eastern District of
7 Wisconsin, do hereby certify that I reported the foregoing
8 proceedings and that the same is true and correct in accordance
9 with my original shorthand notes taken at said time and place.
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13 KATHY A. HALMA
14 Official Court Reporter
15 United States District Court
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